owned status.[108] In the nationwide narrowband PCS auction, also held in July 1994, of the 29 qualified bidders, 20.1% claimed minority-owned status and 10.3% claimed women-owned status.[109] None of the winners were minority or women-owned businesses. In the Fall 1994 regional narrowband PCS auction, which offered a larger bidding credit than was available in the nationwide narrowband PCS auction, of the 28 qualified bidders, 35.7% claimed minority-owned status, and 28.6 % claimed women-owned status.[110] Of the nine winners, 22.2% claimed minority-owned status, and 33.3% claimed women-owned status.[111]

34. We seek a broad and comprehensive record from which to determine whether the experiences of women and particular minority groups in entering and participating in the telecommunications market warrant adopting more significant gender or race-based incentives for minority- or women-owned small businesses. Parties may submit personal accounts of individual experiences, studies, reports, statistical data, or any other relevant information.

35. Commenters should address whether there are particular barriers to entry and expansion based on a small business owner's race or gender. If so, for which services? Do barriers differ by service, e.g., radio, television, advanced television, DBS, PCS, equipment manufacturing? What specific obstacles do women and minorities encounter in trying to start small communications businesses? Are there problems endemic to small women and minority-owned telecommunications businesses but not to small businesses owned by women and minorities in other industries (e.g., retail, real estate), and if so, why? Are any such difficulties the result of race/gender neutral factors such as economic status, geographic location, level of experience? Are differences in capital requirements determinative? What other factors play a role? Commenters should address to what extent any impediments are unique to small businesses owned by women or minorities, rather than small businesses generally.

36. Discrimination can be a market entry barrier. Parties may submit evidence of past or current discrimination based on race or gender. Judicial findings of discrimination are not required.[112] Evidence of discrimination can be derived from a variety of sources.

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[108] 1994 FCC Visitor's Auction Guide at Section IX.

[109] Id. at Section VIII.

[110] Id. at Section VII.

[111] Id.

[112] Parties should be mindful, however, that to the extent it is applicable to federal action, Croson requires that the government have a "'strong basis in evidence for its conclusion that remedial action was necessary.'" City of Richmond v. J.A. Croson, 488 U.S. 469, 500 (1989) (quoting Wygant, 476 U.S. at 277). See also Memorandum Regarding (continued...)

including academic research studies, adjudications, legislative findings, statistical data, and personal accounts. To the extent possible, evidence should relate to a particular racial, ethnic, or gender group.

37. Women and minority owned businesses may have experienced discrimination or difficulty in obtaining government licenses. These experiences may have impeded the ability of such entities to enter the communications market, and consequently, impeded subsequent opportunities. We seek evidence of discrimination or unfavorable treatment by any governmental or public entity with respect to communications-related licenses, contracts or other benefits. It has been argued to the Commission that as a result of our system of awarding broadcast licenses in the 1940s and 1950s, no minority held a broadcast license until 1956 or won a comparative hearing until 1975[113] and that special incentives for minority businesses "are needed in order to compensate for a very long history of official actions which deprived minorities of meaningful access to the radiofrequency spectrum."[114] We solicit comment on this particular argument.

38. Race or gender discrimination in employment may impede participation and advancement in the communications industry. Employment provides business knowledge, judgment, technical expertise, and entrepreneurial acumen, and other experience that is valuable in attaining ownership positions. For example, the Commission has found that employment in the broadcast industry is a valuable stepping stone to broadcast ownership.[115]

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[112](...continued)
Adarand to General Counsels from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, United States Department of Justice (dated June 28, 1995) (DOJ Memorandum) at 11.

[113] See "Statement of David Honig, Executive Director, Minority Media and Telecommunications Council," En Banc Advanced Television Hearing, MM Docket No. 87-268 (December 12, 1995) at 2-3 & n.2.

[114] Id. at n.2 citing Southland Television Co., 10 RR 699, 750, recon. denied, 20 FCC 159 (1955) (awarding a Shreveport VHF license to the owner of a segregated movie theaters because such segregation 'would be legal under the laws of [Louisiana]')."

[115] See 1996 EEO Order and NPRM at ¶ 4 ("employment discrimination in the broadcast industry . . . imped[es] opportunities for minorities and women to learn the operating and management skills necessary to become media owners and entrepreneurs"). See also Policy Statement, Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules, 9 FCC Rcd 929, 930 (1994) (EEO Forfeiture Policy Statement), vacated on other grounds, 1996 EEO Order and NPRM ("increased employment opportunities are the foundation for increasing opportunities for minorities and women in all facets of the communications industry, including participation in ownership").

39. We seek any evidence that employment discrimination in the communications industry has been a barrier to entry in the telecommunications market by small businesses owned by minorities or women. Submissions should be detailed and should explain why the commenter believes the conduct at issue (e.g., failure to hire or promote) was based on race or gender discrimination, rather than the result of a race or gender-neutral factor (e.g., no job vacancy, job applicant not qualified for the position).

IV. ELIMINATING MARKET ENTRY BARRIERS

A. Small Businesses Generally

40. Section 257 requires that after identifying market entry barriers, we prescribe regulations to eliminate those barriers. In implementing this mandate, first, how should we define small businesses under Section 257? By number of employees, gross revenue, net revenue, assets, or any other factor? Should we adopt a general size standard or specific standards for particular services (e.g., broadcast, PCS)? For example, the Commission's current Section 309(j) definitions are based on gross revenues and assets. Are there other factors the Commission should consider in defining what constitutes a small business? Should the Commission explore minimum capital requirements, debt/equity ratios, cash flow, net worth or other indicia of a business' ability to enter and compete in the marketplace?[116] To formulate a policy using such indicia, the Commission would need specific financial information for small businesses generally, and requests that commenters recommending new approaches indicate the type of information needed by the Commission.

41. Second, we seek comments and proposals regarding ways to eliminate market barriers and enhance opportunities for entrepreneurs and small businesses in communications services, including, e.g., wireline, wireless, mass media, cable, satellite. What types of incentives or requirements would be most effective in eliminating market barriers? Commenters may propose new initiatives or suggest changes to existing rules or make any other recommendation. Proposals may address, for example, sale of subscriber lists to independent directory publishers as recognized by Congress in enacting Section 257,[117] or any other area. Commenters should provide data to support their proposals. Because Section 257 states that in prescribing rules to eliminate barriers we must rely on our rulemaking authority under provisions of the Act other than Section 257, we also request that commenters identify specific rulemaking provisions in the Act, e.g., Section 4(i)[118] that would support any such

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[116] The Commission considered different indicia for defining small businesses in the context of the Broadband PCS proceeding, before opting for the $40 million gross revenue standard. See Competitive Bidding Fifth Report & Order, 9 FCC Rcd at 5607 nn.147, 148 (annual operating cash flow, net worth, annual revenues, number of employees).

[117] See supra note 12 (legislative history of Section 257).

[118] 47 U.S.C. § 154(i).

proposals.

42. Our Section 309(j) competitive bidding incentives for small businesses are examples of the types of mechanisms we could adopt in furtherance of our Section 257 mandate. Have bidding credits, installment payments, and reduced upfront payments enhanced opportunities for small business participation? Did the Commission's outreach efforts in providing information to prospective bidders enhance small business participation in each auction? If commenters believe the Commission's existing mechanisms could be modified to enhance opportunities for small businesses, please explain how, or suggest new approaches. In addition, we seek preliminary views on how the Section 309(j) incentives have operated in the five completed auctions employing small business incentives.[119] For example, we are aware of concerns that due to the high level of bidding in the PCS C Block auction successful bidders may find it difficult later on to secure the necessary financial resources to build out their systems, and may ultimately encounter problems in the market against established competitors like incumbent cellular providers and the generally large, well-financed winners of PCS A and B block licenses.[120] How do we balance the desire to do more with the need to ensure that larger businesses do not usurp measures designed to aid small businesses? Do we need to do more to make sure that small businesses have meaningful opportunities to participate in the provision of spectrum-based services?

B. Minority or Women-Owned Small Businesses

43. In Part III.B. above, we request data to identify whether small businesses owned by minorities or women experience unique market barriers. In this section, we explore whether there is sufficient evidence of market barriers to justify special incentives to eliminate those barriers. We do so because governmental action that takes race or gender into account is subject to particular constitutional standards: strict scrutiny for race-based incentives; intermediate scrutiny for gender-based incentives. We discuss these standards below and then seek comment on possible incentives that would satisfy the standards while at the same time furthering the mandate of Section 257.

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[119] Bidding ended in the IVDS MSA auction on July 29, 1994, regional narrowband PCS auction on November 8, 1994, MDS auction on March 28, 1996, 900 MHz SMR auction on April 15, 1996, and the C Block auction on May 6, 1996.

[120] "$6 Billion Bid so Far in Latest F.C.C. Auction For Airwaves," N.Y. Times, February 14, 1996, at D1 Column 6 (noting concerns of one industry consultant that the C Block auction was overvaluing the wireless market by 20%); "Billions Pledged at Wireless License Auction," Washington Post, February 17, 1996 at B1 Column 1 (noting that even with the Commission's liberal payment terms for small businesses, which some analysts figure amounts to a 40-60% discount, small businesses may find difficulty surviving if the market proves soft or glutted with competitors).

1. Constitutional Standards

44. The Constitution limits the power of government to classify individuals based on race or gender. Thus, federal incentive programs that take race or gender into account must satisfy constitutional standards. Courts reviewing government programs have applied different standards of review and reached various results depending on whether the classification covers race or gender and whether the classification burdens or benefits its subjects. Race-based programs must be narrowly tailored to further a compelling governmental interest. Gender-based programs must be substantially related to serve an important governmental interest.

45. In Adarand Constructors, Inc. v. Peña,[121] the Supreme Court held that the federal government's use of race-based criteria for decisionmaking must satisfy the requirements of strict scrutiny.[122] The Court wrote:

> [W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.[123]

By this decision, the Court rejected its earlier legal analysis in Metro Broadcasting, Inc. v. FCC,[124] which had applied the intermediate scrutiny standard of judicial review to the Commission's broadcasting distress sale and comparative preference policies for minorities.[125]

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[121] 115 S.Ct. 2097 (1995).

[122] Prior to Adarand, the standard differed for federal and state programs. Compare Fullilove v. Klutznick, 448 U.S. 448 (1980) (federal program evaluated under intermediate scrutiny) with Croson 488 U.S. 469 (state program evaluated under strict scrutiny).

[123] Id. at 2113.

[124] 497 U.S. 547 (1990).

[125] In Metro Broadcasting, the Court held:

> [B]enign race-conscious measures mandated by Congress -- even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination -- are constitutionally permissible to the extent that they serve important governmental objectives within the

(continued...)

46. Overruling this aspect of Metro Broadcasting, the Court in Adarand clarified the permissible scope of affirmative action. First, the Court rejected the notion that the characterization of a racial classification as "benign" should entitle it a lower level of judicial review. Second, the Court applied to federal minority preference programs the strict scrutiny standard it had applied to a local contracting set-aside program in City of Richmond v. J.A. Croson Co.[126] Yet in doing so, the Court emphasized its intention not to impinge upon the federal government's ability to actively combat both the practice and the continuing effects of discrimination. A majority of the Court rejected any notion that strict scrutiny review is "strict in theory, but fatal in fact." As Justice O'Connor stated in Adarand, "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."[127] In rejecting the Metro Broadcasting standard, the Court nonetheless reasoned that because the Constitution protects individuals rather than groups, any governmental action based upon a racial group classification should be subject to "detailed judicial inquiry."[128]

47. Thus, Adarand established a new strict scrutiny standard for federal minority programs, based upon the two prong analysis of Croson: (1) the governmental interest underlying the affirmative action measure be "compelling;" and (2) the measure adopted must be "narrowly tailored" to serve that interest. Because a federal minority program has not yet been subjected to strict scrutiny pursuant to Adarand, judicial guidance regarding the strict scrutiny standard thus far is limited to Croson and lower court decisions applying strict scrutiny to state and local programs.[129]

48. Under these cases, the most clearly permissible compelling governmental interest is remedying the effects of present or past discrimination. Thus, federal minority incentive programs that serve a remedial interest are likely to satisfy the compelling governmental interest prong. Discrimination can be that committed by the government itself,

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[125](...continued)

> power of Congress and are substantially related to achievement of those objectives.

Id. at 564-65.

[126] 488 U.S. 469 (1989).

[127] Adarand, 115 S. Ct. at 2117.

[128] Id. at 2113.

[129] See Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), petition for cert. filed (holding that the University of Texas School of Law may not use race as a factor in law school admissions).

or by private actors within the government's jurisdiction (such that the government was a "passive participant" or facilitated the perpetuation of a system of exclusion). The government must identify with some precision the discrimination to be redressed.[130] including evidence of discrimination against particular minority groups.[131] General, historical discrimination is an insufficient predicate. "[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota."[132] In addition, the government should have a "strong basis," approaching a "prima facie case of constitutional or statutory violation"[133] of the rights of minorities. Croson permits remedial relief on the basis of "evidence of a pattern of individual discriminatory acts . . . supported by appropriate statistical proof."[134] Post-Croson cases have held that statistical evidence can be probative of discrimination in the remedial setting,[135] and that anecdotal evidence can buttress statistical evidence.[136]

49. Courts generally give more deference to Congressional race-based remedial action than to state action because of Congress' special remedial powers under the Fourteenth Amendment. Thus, it is possible that the Croson standards for remedial action, e.g., the degree of discrimination required to justify remedial action[137] might be lower where

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[130] Croson requires that a government "identif[y] discrimination with the particularity required by the Fourteenth Amendment." Croson, 488 U.S at 492, 499, 509.

[131] Croson, 488 U.S. at 506 ("The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.") See also DOJ Memorandum at 22.

[132] Croson, 488 U.S. at 499.

[133] Id. at 500.

[134] Id. at 509.

[135] See, e.g., Peightal v. Metropolitan Dade County, 26 F.3d 1548, 1556 (11th Cir. 1994) (statistical evidence constitutes "requisite 'strong basis in evidence' mandated by Croson").

[136] See, e.g., Coral Construction Co., 941 F.2d at 919 (convincing anecdotal and statistical evidence can be "potent"); see also DOJ Memorandum at 12-13.

[137] Croson, however, involved a race preference program adopted at the local, rather than federal, level.

Congressional findings are involved.[138]

50. A government may adopt race or gender based programs for reasons other than to remedy discrimination. Such objectives are nonremedial. For example, in Regents of the University of California v. Bakke,[139] the purpose of the state of California's college admissions program was to diversify the student body. No majority opinion of the Court has addressed the sufficiency of nonremedial objectives. Because Croson addressed the authority of a local government to engage in remedial action, it did not decide the sufficiency of nonremedial objectives as a compelling interest. In Croson, Justice O'Connor stated that affirmative action must be "strictly reserved for the remedial setting."[140] In Justice Stevens' dissent in Adarand, however, he stated that Adarand does not expressly adopt the view that past discrimination is the only valid compelling governmental interest; nor does it prohibit nonremedial objectives.[141] In Bakke, Justice Powell found that a university has a compelling interest in taking the race of applicants into account in its admission process in order to foster greater diversity among the student body to enhance the exchange of ideas on campus,[142] and in Wygant v. Jackson Board of Education,[143] Justice O'Connor expressed approval of that view.[144]

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[138] In the DOJ Memorandum, Justice states that Adarand "hinted" that where a federal preference program is congressionally mandated, the Croson standards may apply more loosely. DOJ Memorandum at 30. The Adarand majority confronted the issue of congressional versus state remedial power, noting that various Members of the Court have taken different views of the authority that Section 5 of the Fourteenth Amendment confers upon Congress -- power not delegated to the states -- and the extent to which courts should defer to congressional exercise of that authority. Adarand, 115 S. Ct. at 2114. The Court concluded it did not need to resolve those differences in Adarand, and rejecting Justice Stevens' assertion to the contrary, stated that none of the Justices in Adarand repudiated previously expressed views on this subject. Croson suggested that Congress has broader authority than the states -- a positive grant of legislative power -- and rejected the City of Richmond's finding that it was remedying the present effects of past discrimination. Croson, 488 U.S. at 498.

[139] 438 U.S. 265 (1978) (plurality).

[140] Croson, 488 U.S. at 493.

[141] Adarand, 115 S. Ct. at 2127-28 (Stevens, J. dissenting).

[142] 438 U.S. at 311-14.

[143] 476 U.S. 267 (1986).

[144] Id. at 286. In Hopwood, a panel of the Fifth Circuit held that the University of Texas (continued...)

51. The second prong of strict scrutiny analysis requires that the use of any racial classification be "narrowly tailored," to ensure that "the means chosen 'fit' [the] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."[145] In Adarand, the Court identified two factors in determining whether the use of a racial classification is narrowly-tailored: (1) whether race-neutral alternatives were considered, and (2) whether the measure is appropriately limited in duration so that it will not continue longer than purposes for which it was adopted. Additional factors, identified in post-Croson cases, are: (3) the flexibility of the program, e.g., whether it contains a waiver provision that may narrow its scope; (4) the manner in which race is used, whether as a determinant, or as one of several factors; (5) whether any numerical target is compared to the relevant number of qualified minorities or to the population of minorities as a whole; (6) the extent of the burden on nonminorities.

52. Since Adarand, the Supreme Court has not ruled on the standard of review for federal gender-based programs, although the issue is before it in a pending case.[146] Prior to Adarand, the Court applied intermediate scrutiny; that standard currently applies.[147] Under

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[144](...continued)
"law school has presented no compelling justification, under the Fourteenth Amendment or Supreme Court precedent, that allows it to continue to elevate some races over others, even for the wholesome purpose of correcting perceived racial imbalance in the student body." Hopwood, 78 F.3d at 934. A majority of the Hopwood panel specifically rejected Justice Powell's opinion in Bakke that diversity can be a compelling interest as "not binding precedent" and concluded that "any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment." Id. at 944. In a concurring opinion, Judge Wiener disagreed with the panel's opinion that diversity can never be a compelling governmental interest, but concluded that the program in question was not narrowly tailored because it singled out only two minority groups -- Blacks and Mexican Americans. Id. at 962-68.

[145] Croson, 488 U.S. at 493.

[146] United States v. Commonwealth of Virginia, 44 F.3d 1229 (1995), cert. granted, 116 S.Ct. 281 (1995) (No. 94-1941) (argued Jan. 17, 1996). The case presents the question whether the Equal Protection Clause permits a state to maintain single-sex military-style educational programs.

[147] Craig v. Boren, 429 U.S. 190, 197 (1976). Thus far, the Court has not decided whether gender is a suspect category. See, e.g., J.E.B. v. Alabama ex rel. T.B., 114 S.Ct. at 1419, 1425 n.6 (1992) (concluding that gender-based peremptory challenges are not substantially related to an important governmental objective and finding "once again" that the Court need not decide whether gender classifications are inherently suspect"); Mississippi University for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982) (finding it "unnecessary" to decide whether classifications based upon gender are inherently suspect).

the intermediate scrutiny standard, "[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to those objectives."[148]

53. In applying intermediate scrutiny to invidious gender-based classifications, the Court has expressed concern that such classifications are, in fact "reflective of 'archaic and overbroad' generalizations about gender" or are "based on 'outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas.'"[149]

54. It is unclear what standard would apply to benign gender classifications. In Adarand, the Court refused to apply a less strict standard to benign race-based classifications than the standard applied to "invidious" race-based classifications. Although Adarand did not address gender, its rejection of a lower standard for benign action in the race context suggests that the same standard applied to invidious gender classifications should apply to benign gender classifications. This conclusion is supported by the Court's analysis in Mississippi University for Woman v. Hogan,[150] which held that a state university's exclusion of men from its nursing program violated the Equal Protection Clause under a test of intermediate scrutiny. Rejecting the state's assertion that the all-female program was a form of affirmative action, the Court explained:

> In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.[151]

55. In evaluating the second prong of the intermediate scrutiny test -- whether a gender classification is substantially related to the government's objective -- courts consider

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[148] Boren, 429 U.S. at 197. See also J.E.B. v. Alabama ex rel. T.B., 114 S.Ct. 1419, 1425 (1994) ("our Nation has had a long and unfortunate history of sex discrimination, a history which warrants the heightened scrutiny we afford all gender-based classifications today"); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) ("[l]egislative classifications based on gender call for a heightened standard of review").

[149] J.E.B., 114 S.Ct. at 1424-25 (citations omitted). The Court has rejected attempts to exclude or protect one gender based on presumptions. See Hogan, 458 U.S. at 725.

[150] 458 U.S. 718 (1982).

[151] Id. at 728. The Court found that the purpose of requiring a close relationship between the objective and the means is "to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." Id. at 725-26.

several factors, including the correlation between gender and the actual activity the government seeks to regulate and the practical effect of the program.[152]

2. *Possible Incentives*

56. As described above, a record of discrimination against a particular group is necessary to support remedial measures to remedy such discrimination. We seek comment on whether under the compelling governmental interest prong, there is sufficient evidence of discrimination in the communications industry against any particular minority group to support race-based incentives to eliminate market entry barriers for such group. As discussed above, minority groups include African Americans, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders.[153] We also ask whether there is sufficient evidence of discrimination against women in telecommunications to justify remedial-based mechanisms to eliminate market entry barriers for women, under either the compelling governmental interes prong (strict scrutiny) or important governmental interest (intermediate scrutiny). Parties may use any data submitted in response to Part III above to support their comments.

57. We also seek comment on any nonremedial objectives that would justify the use of race and gender-based incentives and also serve the Section 257 mandate of decreasing market entry barriers for small telecommunications firms owned by minorities and women. Nonremedial objectives could be in addition to the objective of remedying past discrimination; thus, they may provide a separate basis for governmental action that takes race and gender into account. For example, the Commission has sought to fulfill the nonremedial objective of increasing diversity of voices and viewpoints over the airwaves through various minority and women-based programs.[154] Those programs also decrease market barriers by providing new opportunities for women and minorities and by increasing incentives for other firms to do business with those entities. Other nonremedial objectives that could justify taking race or

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[152] See, e.g., Boren, 429 U.S. at 200-04 (finding that the low disparity between drunk driving statistics for men and women "exemplifies the ultimate unpersuasiveness of this evidentiary record"); Hogan, 458 U.S. at 730-32 (finding that presence of men in nursing school would not have negative effect on women students, and that the record is "flatly inconsistent" with the claim that excluding men is necessary to reach the state's educational goals and falls "far short" of the "'exceedingly persuasive justification'" needed to sustain a gender-based classification).

[153] See supra note 88 (definition of minority). When considering incentives for Native Americans, the Commission looks for guidance to the Indian Commerce clause, which recognizes the status of tribes as sovereign nations. See Competitive Bidding Sixth Report and Order, 11 FCC Rcd at 155-56. See also DOJ Memorandum at 8 ("Adarand does not require strict scrutiny review for programs benefitting Native Americans as members of federally recognized Indian tribes").

[154] See supra ¶¶ 18-23.

gender into account in Commission programs and also help eliminate market barriers might include favoring diversity of media voices as required by Section 257(b),[155] promoting economic opportunity and competition as encouraged in the legislative history of Section 257[156] and Section 257(b),[157] and as required by Section 309(j),[158] or promoting the public interest.[159] We seek comment on these nonremedial objectives[160] and request commenters to suggest other nonremedial objectives that would satisfy the governmental interest prong under strict (race) or intermediate (gender) scrutiny.

58. We also request that parties propose incentives to meet these remedial or nonremedial objectives. Commenters may address incentives that the Commission has adopted in the past that eliminated or reduced barriers to market entry, e.g., designated entity rules for Section 309(j) services, as well as propose new incentives. We also seek comment on whether incentives that foster ownership or employment of women or minorities in telecommunications would further these objectives.[161] Parties should explain what objective

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[155] 47 U.S.C. § 257(b).

[156] See supra ¶ 3 and note 9.

[157] Section 257(b) provides: "In carrying out subsection (a), the Commission shall seek to promote the policies and purposes of this Act favoring . . . vigorous economic competition." 47 U.S.C. § 257(b).

[158] 47 U.S.C. § 309(j).

[159] See, e.g., 47 U.S.C. § 201 (public interest regulation of common carriers); 47 U.S.C. § 257(b) (promotion of public interest, convenience and necessity in carrying out Section 257(a)); 47 U.S.C. § 303 (public interest regulation of radio services).

[160] Depending on the record of discrimination developed, any such nonremedial objectives could be remedial in nature. For example, if there were a strong record of discrimination against women-owned small businesses in the telecommunications market (which itself would be an entry barrier), we could adopt a mechanism intended to increase ownership opportunities for those businesses. The immediate objective -- increasing ownership -- would be a means of achieving the ultimate objective -- remedying discrimination.

[161] The legislative history of Section 257 indicates that Congress recognized a nexus between ownership and competition: "[M]inority and women-owned small businesses continue to be extremely under represented in the telecommunications field. . . . Underlying [Section 257] is the obvious fact that diversity of ownership remains a key to the competitiveness of the U.S. communications marketplace." 142 Cong. Rec. H1141 at H1176-77 (daily ed. Feb. 1, 1996) (statement of Rep. Collins).

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an incentive is intended to achieve and explain how it is either narrowly tailored (to meet strict scrutiny) or substantially related (to meet intermediate scrutiny) to achieve that objective. Parties should support their proposals with data and should identify specific provisions of the Act that would authorize us to implement those proposals.

C. Furthering Section 257(b) Objectives

59. As described in the Introduction to this NOI, in Section 257(b), Congress required that in implementing our market barriers initiatives, the Commission must "promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity."[162] We ask for comment on how the Commission should foster these objectives in its efforts to eliminate market barriers for entrepreneurs and small businesses.

V. PROCEDURAL MATTERS AND ORDERING CLAUSE

60. This proceeding is exempt from ex parte restraints or disclosure requirements, as provided in Section 1.1204 (a)(4) of our rules

61. Interested parties must file initial comments on or before July 24, 1996 and reply comments on or before August 23, 1996. To file formally in this proceeding, interested parties must file an original and six copies of all comments. If interested parties want each Commissioner to receive a personal copy of their comments, they must file an original plus ten copies.

62. Interested parties should send comments to: Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Parties also should send one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Room 246, 1919 M Street, N.W. Washington, D.C. 20554.

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[161](...continued)

We note that communications is among a handful of industries with the highest expected growth between the year 1990 and 2005, and is predicted to provide women opportunities for advancement into management and decisionmaking positions. A Solid Investment: Making Full Use of the Nation's Human Capital, Recommendations of the Federal Glass Ceiling Commission (November 1995) (Glass Ceiling Report), Special Supplement at S-9. In addition, facilitating employment could serve the public interest by enhancing productivity: the Glass Ceiling Commission found that "[o]rganizations that excel at leveraging diversity (including hiring and promoting minorities and women into senior positions) can experience better financial performance in the long run than those which are not effective in managing diversity." Glass Ceiling Report, Special Supplement at S-8.

[162] 47 U.S.C. § 257(b)

Comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. For further information, contact Linda L. Haller in the Office of General Counsel at (202) 418-1720 or S. Jenell Trigg in the Office of Communications Business Opportunities (202) 418-0990.

63. We also ask parties to submit comments and reply comments on diskette in addition to and not as a substitute for the formal filing requirements stated above. Parties submitting diskettes should submit them to S. Jenell Trigg, Office of Communications Business Opportunities, Federal Communications Commission, Suite 644, 1919 M Street, N.W., Washington D.C. 20554. Submissions should be on a 3.5 inch diskette formatted in an IBM compatible form using WordPerfect 5.1 for Windows software. The diskette should be submitted in "read only" mode. The diskette should be accompanied by a cover letter and clearly labelled with the party's name, proceeding, type of pleading (comment or reply comment) and date of submission.

64. Accordingly, IT IS ORDERED that, pursuant to our authority under the Communications Act of 1934, 47 U.S.C. §§ 4(i) and 403, an inquiry IS COMMENCED to identify and eliminate market entry barriers for small businesses in the provision and ownership of telecommunications and information services in the telecommunications market.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary